76-1309
No.

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED STATES OF AMERICA, PETITIONER

v.

ALFREDO L. CACERES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 545 F.2d 1182. The opinion of the district court (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1976. A petition for rehear-

ing with a suggestion for rehearing *en banc* was denied on January 20, 1977 (App. B, *infra*). On February 10, 1977, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it is proper to suppress otherwise admissible and probative evidence in a criminal case because of the government's failure fully to comply with an internal regulation that is not required by the Constitution or by statute.

STATUTORY AND OTHER PROVISIONS INVOLVED

18 U.S.C. 3501 provides in relevant part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. * * *
>
> * * * * *
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Paragraph 652.22 of the Internal Revenue Service Manual provides in pertinent part:

> (1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. If the Director, Internal Security Division, cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.
>
> (2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical, electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. * * * Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use.

(3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of person involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] * * *.

* * * *

(6) When emergency situations occur, the Director, or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelegated. * * * Emergency authorizations pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.

(7) If, at the time the emergency approval request is submitted, it is desired that approval for use of electronic equipment be given for an extended period, this should be indicated on the [appropriate form]. The Director, in addition to reporting his authorization for emergency use to the Attorney General, will also request approval for the Use of Electronic Equipment for the duration of that period specified by the requestor.

STATEMENT

1. In March 1974, during an audit by the Internal Revenue Service ("IRS") of respondent's individual

and employment tax returns, respondent proposed a "personal settlement" with Internal Revenue Agent Robert K. Yee (S. Tr. 11).[1] Agent Yee reported the offer to the Internal Security Division of the IRS (S. Tr. 23, 28-29). On January 27, 1975, Agent Yee met with respondent a second time, and respondent renewed his offer (D. Exh. L). On January 30, 1975, Agent Yee telephoned respondent and suggested that they meet on the following day at respondent's office (S. Tr. 15). During that meeting respondent gave Agent Yee $500 to settle the tax investigation in his favor. Agent Yee recorded the events by means of an electronic monitoring device hidden on his person (App. A, *infra*, pp. 2a-3a).

Agent Yee telephoned respondent again on February 5, 1975, and scheduled another meeting for the following afternoon to show respondent an agreement form by which he could accept the agent's calculation of his tax liability (S. Tr. 17-18). That meeting—at which respondent offered Yee $2,000 to audit his income tax returns to respondent's satisfaction—was also monitored and recorded by the agent without respondent's knowledge (App. A, *infra*, pp. 3a-4a).

A third meeting took place on February 11, 1975. It, too, was secretly monitored and recorded by the agent. At that meeting respondent offered Yee an additional $500 to conclude the audit in respondent's favor (App. A, *infra*, p. 4a).

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[1] "S.Tr." refers to the one-volume transcript of the suppression hearing held on December 8, 1975. "D.Exh." refers to defense exhibits.

On February 26, 1975, respondent was indicted in the United States District Court for the Northern District of California on three counts of bribing a federal official, in violation of 18 U.S.C. 201(b) (App. A, *infra*, p. 1a).

2. Prior to trial,[2] respondent moved to suppress the recordings of his conversations with Agent Yee [3] on the ground that they had not been properly authorized under applicable IRS internal regulations governing consensual monitoring of face-to-face conversations between agents and taxpayers.[4] Those regulations require that, except in "exigent circumstances," advance authorization for such monitoring be obtained by designated IRS officials from the Justice Department (IRS Manual ¶ 652.22(1)). "Exigent circumstances" are not defined, but the regulations provide that emergency authorization within the IRS alone "will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General" (IRS Manual ¶ 652.22(6)).

[2] Respondent's first trial ended in a mistrial when the jury was unable to reach a verdict. The motion to suppress was filed before the second trial began.

[3] The telephone conversation on January 30, 1975, as well as telephone conversations between Agent Yee and respondent on January 28 and 29 and February 5 and 13, 1975, were electronically monitored and recorded with Agent Yee's consent. The district court found (App. C, *infra*, p. 17a) that these recordings were made in substantial compliance with pertinent IRS regulations and accordingly denied respondent's motion to suppress them. The admissibility of those recordings is not at issue here.

[4] The IRS regulations were drafted to conform to the Attorney General's October 16, 1972, "Memorandum to the Heads of Executive Departments and Agencies" establishing guidelines for agency self-regulation of the consensual monitoring of conversations during criminal investigations. It required all federal departments and agencies to obtain advance authorization from the Attorney General or any designated Assistant Attorney General before conducting consensual monitoring of non-telephone conversations. Subsequently the memorandum was amended to permit authorization by any designated Deputy Assistant Attorney General as well. (App. A, *infra*, pp. 6a-7a).

The monitoring of the January 31, 1975, meeting had not been authorized by the Justice Department but had been given "emergency approval" by the Director of the IRS Internal Security Division pursuant to paragraph 652.22(6) (S. Tr. 56). A pending request for authorization to monitor the February 6, 1975, meeting had not yet been acted on by the Justice Department when that meeting occurred; the monitoring was again approved on an emergency basis by the Director of the Internal Security Division (*ibid.*). The monitoring of the February 11, 1975, meeting was authorized by the Justice Department as well as by appropriate IRS personnel (S. Tr. 52-54; D. Exh. O).

The district court suppressed all three recordings (App. C, *infra*). It ruled that since Agent Yee had scheduled the date of the first two meetings himself, no bona fide emergency existed to justify the failure to get advance approval from the Justice Department for the monitoring of those meetings (*id.* at 19a-20a). The district court also found (*id.* at 18a) that the February 11 monitoring violated the IRS regulations because it had been authorized by a Dep-

uty Assistant Attorney General rather than by the Attorney General or an Assistant Attorney General.

3. On appeal, the court of appeals reversed the suppression of the February 11 recording, holding that the authorization by a Deputy Assistant Attorney General was not inconsistent with the IRS regulations (App. A, *infra*, pp. 4a-8a). It agreed with the district court, however, that the invocation of emergency authorization procedures for the monitoring of the January 31 and February 6 meetings had not been justified by "exigent circumstances," and it affirmed the suppression of the recordings made of those meetings (*id.* at 8a-9a).

The court acknowledged (App. A, *infra*, p. 10a; citation and footnote omitted) that "[d]uring 'a period of increasing disenchantment with the exclusionary rule,' * * * the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach." It felt bound, however—"[a]bsent a contrary ruling by the Supreme Court or by this court en banc"—by the decision of another panel of the Ninth Circuit in *United States* v. *Sourapas*, 515 F.2d 295, suppressing evidence obtained by an IRS agent who questioned a potential criminal defendant without first giving *Miranda*-type warnings, as required by IRS regulations.

In its order denying the government's petition for rehearing (App. B, *infra*), the court amended its

opinion by adding the following paragraph to the discussion on suppression (App. A, *infra*, pp. 10a-11a):

> Our decision today does not mean that in every instance a deviation from general guidelines governing Executive exercises of discretion will result in the automatic exclusion of evidence. As noted in *United States* v. *Leahey*, 434 F.2d 7, 11 (1st Cir. 1970): "We do not say that agencies always violate due process when they fail to adhere to their procedures." Here, however, the noncompliance by the IRS for the January 31 and February 6 monitorings harmed more than just the "efficiency of the I.R.S. operations." *Id.*

REASONS FOR GRANTING THE PETITION

This case presents the important question whether the courts may properly suppress probative and otherwise admissible evidence of crime because of a failure by a government agency to follow internal regulations that impose upon agency personnel duties not required by the Constitution or by statute.

The regulations at issue here apply to criminal investigatory rather than to administrative adjudicatory functions. There is no way in which respondent could have relied upon them to his detriment, and they conferred no enforceable rights upon him. In our view the failure to follow them is the concern of the Executive Branch alone and provides no occasion for the courts to suppress evidence in a criminal trial. The

effect of applying the exclusionary rule in cases such as this one is to discourage the government from formulating internal rules to govern the conduct of its employees beyond those required by the Constitution or by statute. The issue is both recurring and important to the proper administration of the criminal law. It should be resolved by this Court.

1. The opinion of the court of appeals does not explicitly state the basis upon which it rested its result—*i.e.*, whether it believed suppression was appropriate because the governmental actions in this case violated the Constitution, or whether it acted in the exercise of its supervisory powers.[5] If indeed the court suppressed the evidence in the exercise of its supervisory powers, it erred for the reasons more fully set forth in our pending petition in *United States* v. *Jacobs*, No. 76-1193.[6] The courts of appeals'

[5] The court said (App. A, *infra*, p. 10a; footnote omitted) that "the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach." This statement indicates that the court may have been relying on its supervisory powers, since without a finding that the Constitution or any statute required suppression there would be no other authority for the court's action.

[6] *Jacobs* presents the question whether a court of appeals possesses (and should exercise) supervisory power to suppress allegedly perjurious grand jury testimony for the sole reason that the prosecutor failed to follow the usual circuit-wide practice of giving "target warnings" to grand jury witnesses who are potential defendants. We are sending a copy of our petition in *Jacobs* to respondent.

supervisory powers are limited by relevant Acts of Congress (see, *e.g.*, *Palermo* v. *United States*, 360 U.S. 343, 353, n. 11), and here, as in *Jacobs*, both 18 U.S.C. 3501 and Rule 402 of the Federal Rules of Evidence mandate the admission into evidence of respondent's recorded conversations.[7] Moreover, even absent these controlling statutes, the court's application of supervisory powers to suppress the recordings, where there was "no manifestly improper conduct by federal officials," would be "wholly unwarranted." *Lopez* v. *United States*, 373 U.S. 427, 440. See also *United States* v. *Jones*, 433 F.2d 1176, 1181-1182 (C.A.D.C.), certiorari denied, 402 U.S. 950.

2. The court's reliance on *United States* v. *Sourapas*, 515 F.2d 295 (C.A. 9), *United States* v. *Leahey*, 434 F.2d 7 (C.A. 1), and *United States* v. *Heffner*, 420 F.2d 809 (C.A. 4), indicates that it believed that the Due Process Clause required suppression in this case. Those decisions invoked a due process rationale

[7] Section 3501 provides that "a confession"—defined to mean "any self-incriminating statement"—"shall be admissible in evidence if it is voluntarily given." There is no question that respondent's offers of money in exchange for Agent Yee's favorable disposition of respondent's audit were both "self-incriminating" and "voluntarily given."

Rule 402, Fed. R. Evid., provides that "[a]ll relevant evidence is admissible" except as otherwise provided by the Constitution, by statute, by the Rules of Evidence themselves, "or by other rules prescribed by the Supreme Court pursuant to statutory authority." In enacting this Rule, Congress withdrew from all federal courts save the Supreme Court any power to fashion special rules of evidentiary exclusion, and permitted the Supreme Court to act in this regard only "pursuant to statutory authority."

to suppress incriminating evidence where an IRS investigative agent had failed to precede questioning of a potential criminal defendant with *Miranda*-type warnings, as required by IRS regulations. They in turn relied heavily on *Accardi* v. *Shaughnessy*, 347 U.S. 260, and three other decisions of this Court decided in its wake.[8]

In our view that reliance was misplaced. The issue in *Accardi* was the lawfulness of final agency action taken in disregard of published regulations having "the force and effect of law" (347 U.S. at 265) and governing the essentially adjudicatory procedure for administrative suspension of deportation. In invalidating the agency action, the Court cited (347 U.S. at 265, n. 7) *Bridges* v. *Wixon*, 326 U.S. 135, in which it was said that the administrative procedures promulgated to govern deportation proceedings were "safeguards against essentially unfair procedures" and were designed "to protect the interests of the alien and to afford him due process of law" (*id.* at 152, 153).[9]

[8] *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Yellin* v. *United States*, 374 U.S. 109.

[9] The employment termination cases of *Service* v. *Dulles* and *Vitarelli* v. *Seaton*, *supra*, also involved agency failure to follow procedural regulations intended to guarantee fairness in quasi-adjudicatory administrative proceedings. *Yellin* v. *United States*, *supra*, involved the failure by the House Committee on Un-American Activities to follow rules that by their own terms were required to be distributed to each witness appearing before the Committee (374 U.S. at 121, 123) and explicitly created and held out to those witnesses certain procedural "rights and privileges" (*id.* at 115).

By contrast, the IRS regulation involved in *Leahey*, *Heffner*, and *Sourapas* does not apply to trial-type proceedings and was not promulgated to protect against "essentially unfair procedures" or to afford anyone "due process of law." [10] Cf. *United States* v. *Leonard*, 524 F.2d 1076, 1089 (C.A. 2) (Friendly, J.) (indicating that those decisions would not be followed were the issue to be squarely presented). At least absent a showing by the defendants in those cases that they relied to their detriment on the announced agency policy, due process was not violated by the investigating agents' failure to give *Miranda*-type warnings and the exclusion of relevant evidence was improper.[11]

[10] See *Beckwith* v. *United States*, 425 U.S. 341, holding that statements given by a taxpayer to IRS agents in the course of a non-custodial interview in a criminal tax investigation were admissible in the ensuing criminal prosecution even though the interview had not been preceded by *Miranda* warnings.

[11] Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 538-539, excusing an agency failure to follow its own regulations because "[t]he rules were not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion as in *Vitarelli* v. *Seaton*, 359 U.S. 535; nor is this a case in which an agency required by rule to exercise independent discretion has failed to do so. *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Yellin* v. *United States*, 374 U.S. 109." See also *United States* v. *Lockyer*, 448 F.2d 417, 420-421 (C.A. 10), distinguishing *Accardi* as involving "a vital procedural provision"; *National Capital Airlines, Inc.* v. *Civil Aeronautics Board*, 419 F.2d 668, 676-677, n. 12 (C.A.D.C.), certiorari denied, 398 U.S. 908, distinguishing *Accardi* as involving a violation of regulations

But whatever may have been the correct result in those three cases, in the present case there is no conceivable basis on which to predicate a violation of respondent's due process rights. The IRS regulations at issue here, like the guidelines issued by the Attorney General to which they were intended to conform (see note 4, *supra*), were meant simply "to provide some degree of internal governmental supervision over consensual overhearings." *United States* v. *Kline*, 366 F. Supp. 994, 997 (D.D.C.). "[N]o citizen * * * can claim reliance on them," and they "do not have the force or effect of law * * *" (*ibid.*). They are, like the regulations at issue in *Sullivan* v. *United States*, 348 U.S. 170, 173, merely "housekeeping provision[s]." [12] Cf. *United States* v. *Hutul*, 416 F.2d 607, 626-627 (C.A. 7), certiorari denied, 396 U.S. 1012.

Respondent did not know that his conversations were being recorded. *A fortiori*, he did not know that

governing accusatory proceedings that amounted to a denial of due process.

[12] In *Sullivan* the Court refused to dismiss an indictment that was returned on the basis of evidence of violation of the internal revenue laws presented to a grand jury without the prior approval of the Attorney General, as required by an internal Department of Justice regulation. The Court noted that the regulation was never officially promulgated or published in the Federal Register, but was "simply a housekeeping provision of the Department" (348 U.S. at 173). It held that the Assistant United States Attorney who violated the regulation was "answerable to the Department, but [that] his action before the grand jury was not subject to attack by one indicted by the grand jury on [the evidence presented]" (*id.* at 174).

they were being recorded without Justice Department approval. It cannot be suggested that he would have behaved differently had Agent Yee fully complied with the applicable IRS regulations.[13] Cf. *United States* v. *White*, 401 U.S. 745, 752 (plurality opinion). Agency regulations that, observed or not, can have no possible bearing on how an individual under investigation will conduct himself cannot be said to confer any due process rights upon such individuals.[14] See Note, *Violations By Agencies of Their*

[13] Nor can it be suggested that the Justice Department would not have authorized Agent Yee's conduct. The Justice Department and IRS regulations at issue here were designed to permit responsible government officials to control the actions of their subordinates (see *United States* v. *Kline*, *supra*), so that out of the broad class of persons whose conversations with government agents might be recorded without constitutional or statutory restraint, only those persons subject to a legitimate criminal investigation would be monitored. A person suspected of offering a bribe to a public official is clearly a proper subject of criminal investigation, and accordingly Agent Yee's monitoring of respondent's conversations, even though not approved by the Justice Department, did not result in a recording that would not otherwise have occurred. The Justice Department's subsequent approval of the monitoring of the February 11 conversation confirms that the Department officials charged with the government's criminal enforcement effort considered this a case appropriate for monitoring.

[14] No other constitutional or statutory rights of respondent's were violated by the government's conduct in this case. The warrantless monitoring and recording of a conversation to which a consenting government agent is a party is authorized by 18 U.S.C. 2511(2)(c) and has been upheld by this

Own Regulations, 87 Harv. L. Rev. 629, 634-635 (1974); cf. *United States* v. *Bland*, 458 F.2d 1, 7-8 (C.A. 5), certiorari denied, 409 U.S. 843.

3. Since all of respondent's constitutional and statutory rights were respected in this case, suppression of the recordings solely because of the IRS's failure to follow its own internal regulations did not further any of the policies justifying application of an exclusionary rule, and indeed may have worked against them.

The core objective of the exclusionary rule is the deterrence of unlawful government conduct in order to effectuate constitutional guaranties, especially the Fourth Amendment's protection against unreasonable searches and seizures. *United States* v. *Calandra*, 414 U.S. 338, 347. Accord, *e.g.*, *United States* v. *Janis*, No. 74-958, decided July 6, 1976, slip op. 13; *Stone* v. *Powell*, No. 74-1055, decided July 6, 1976, slip op. 18-19; *United States* v. *Peltier*, 422 U.S. 531, 536-539; *Michigan* v. *Tucker*, 417 U.S. 433, 446-447; *Desist* v. *United States*, 394 U.S. 244, 254, n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636-637. Yet "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons" (*Stone* v. *Powell*, *supra*, slip op. 19); in particular, this Court has declined to apply the rule in circumstances where

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Court against challenge under the Fourth Amendment. *United States* v. *White*, 401 U.S. 745, 752-753 (plurality opinion); *Lopez* v. *United States*, 373 U.S. 427, 438-439.

exclusion would have a minimal deterrent effect and would frustrate significant public interests. See, *e.g.*, *United States* v. *Calandra*, *supra*, 414 U.S. at 349, 351; *United States* v. *Janis*, *supra*, slip op. 20; *Michigan* v. *Tucker*, *supra*, 417 U.S. at 447-448.

Even assuming that the exclusionary rule might properly be invoked upon proof of repeated and deliberate violations of agency regulations like those at issue here, so far as the record shows the noncompliance in this case was isolated and accidental.[15] If the exclusionary rule is inapplicable for want of deterrent impact in cases involving constitutional violations, then surely it is inapplicable where its deterrent effect would be negligible and the violation amounted to no more than an inadvertent noncompliance with an internal agency regulation. See *United States* v. *Feaster*, 494 F.2d 871, 875-876 (C.A. 5), certiorari denied, 419 U.S. 1036; *United States* v. *Walden*, 490 F.2d 372, 376-377 (C.A. 4), certiorari denied, 416 U.S. 983.[16] Indeed, the appropriate rem-

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[15] There is no basis for accusing the IRS, which believed in both instances that the situation called for application of the emergency authorization procedures of its regulations, of bad faith in failing to secure Department of Justice approval for the monitoring of the January 31 and February 6 meetings between Agent Yee and respondent.

[16] See *United States* v. *Burke*, 517 F.2d 377 (C.A. 2) (Friendly, J.), refusing to suppress evidence seized pursuant to a warrant that failed to conform to several nonconstitutional requirements of Rule 41, Fed. R. Crim. P. The court said that the exclusionary rule is " 'a blunt instrument, conferring an altogether disproportionate reward not so much

edy for any infraction of regulations here (which did not violate respondent's rights) was a matter for the Executive Branch to determine, not the court of appeals. *Sullivan* v. *United States*, *supra*, 348 U.S. at 174; *United States* v. *Leonard*, *supra*, 524 F.2d at 1089.[17]

Moreover, there are strong countervailing interests that militate in favor of admitting the recordings in this case. The district court did not rule that Agent Yee could not testify at respondent's trial about the alleged bribe offers that occurred on January 31 and February 6, 1975, and we know of no reasons why such testimony would be disallowed. See *United States* v. *White*, *supra*; *Lopez* v. *United States*, *supra*. In these circumstances, suppression of the recordings of those transactions disserves the fact-finding function of the trial, since "[a]n electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a police agent" (*United States* v. *White*, *supra*, 401 U.S. at 753 (plurality opinion)).

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in the interest of the defendant as in that of society at large.' For that reason courts should be wary in extending the exclusionary rule * * * to violations which are not of constitutional magnitude" (*id.* at 386; footnote omitted).

[17] The IRS regulations involved here provide for disciplinary action, including removal from the Service, for employees who knowingly violate those regulations. IRS Manual ¶ 651.1(3).

The more important consideration, however, is that the extension of the exclusionary rule to cases such as this is not only unjustified by the policies underlying the rule, but actually tends to produce results that are contrary to those that the rule seeks to foster. The broad role of the exclusionary rule is to encourage governmental respect for citizens' constitutional and statutory rights. Many voluntarily adopted internal governmental guidelines and regulations have an essentially similar purpose in regard to societal or individual interests that, while significant, are not so fundamental as to command constitutional or statutory protection. Use of the exclusionary rule to punish the government for failing to follow such regulations is less likely to encourage governmental respect for the interests involved than to discourage adoption of such regulations in the first place. The defendant receives "an altogether disproportionate reward" (*United States* v. *Burke*, *supra*, 517 F.2d at 386), yet society receives no offsetting benefit.

Indeed, society suffers twice: criminal prosecutions are impeded, and the government is deterred from adopting rules and practices that go beyond what the Constitution or a statute may require.[18] The wisdom

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[18] The present case is not an isolated instance of this phenomenon. In addition to *Leahey*, *Heffner*, *Sourapas*, and *Jacobs*, *supra*, each one suppressing evidence because the government failed to adhere to an internal regulation or practice, see *United States* v. *Choate*, 422 F. Supp. 261 (C.D. Cal.), excluding evidence of narcotics violations obtained by

of seeking to compel compliance with such internal administrative regulations by means of the coercive sanction of exclusion of relevant evidence in criminal prosecutions is a matter that merits consideration by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1977.

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use of a mail cover that the district court determined had been instituted without adequate compliance with applicable Postal Service regulations.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1091

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

ALFREDO L. CACERES, DEFENDANT-APPELLEE

[October 15, 1976]

Appeal from the United States District Court for the Northern District of California

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Before: WRIGHT and SNEED, Circuit Judges, and FITZGERALD,* District Judge.

OPINION

WRIGHT, Circuit Judge:

Appellee was charged with three counts of bribery of an Internal Revenue Service (IRS) agent [18 U.S.C. § 201(b)]. Before trial he moved to suppress, *inter alia*, tape recordings of three face-to-face conversations with IRS agent Yee. The district court

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* Honorable James M. Fitzgerald, United States District Judge of the District of Alaska, sitting by designation.

suppressed the recordings. We affirm in part and reverse in part.

The IRS began to investigate appellee's individual and employment tax returns in March 1974. Yee testified at the suppression hearing that appellee offered a bribe in exchange for settlement of appellee's tax dispute. No further contact occurred between appellee and the IRS until January 1975.

On January 27, 1975, Yee again met with appellee and reported to his superiors that the bribe offer had been renewed. On January 30, in a call initiated by the agent, appellee agreed to meet Yee on the following day. Yee suggested the time. The IRS determined that this face-to-face encounter should be electronically recorded. IRS procedures for obtaining authorization for such surveillance required that in all but "emergency situations" IRS agents obtain approval from named personnel in the Justice Department as well as certain designated officials in their own agency. Internal Revenue Manual (Manual) ¶ 652.22.[1] Although proper IRS approval was obtained for the January 31 surveillance, Justice De-

[1] Paragraph 652.22 provides, in pertinent part:

(1) The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. This authority cannot be redelegated. These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization

partment approval was not sought. Count I charges that during the meeting on January 31, 1975, appellee gave the IRS agent $500.

On February 5, 1975, Yee scheduled another meeting with appeliee for the following day. Again, the IRS did not seek Justice Department approval for the electronic surveillance conducted. Count II alleges

of the Attorney General in advance. If the Director, Internal Security Division, cannot be reached, the Assistant Commissioner (Inspection) may grant emergency approval. This authority cannot be redelegated.

(2) Written approval of the Attorney General must be requested 48 hours prior to the use of mechanical electronic or other devices to overhear, transmit or record a non-telephone private conversation with the permission of one party to the conversation. * * * Any requests being telefaxed into the National Office should be submitted four days prior to the anticipated equipment use.

(3) [A request] must be signed and submitted by the Regional Inspector or Chief, Investigations Branch, to the Director, Internal Security Division. Such requests will contain [reason for such proposed use; type of equipment to be used; names of person involved; proposed location of equipment; duration of proposed use (limited to 30 days from proposed beginning date); and manner or method of installation] ....

* * * * *

(6) When emergency situations occur, the Director or Acting Director, Internal Security Division, or the Assistant Commissioner (Inspection) will be contacted to grant emergency approval to monitor. This emergency approval authority cannot be redelegated. . . . Emergency authorizations pursuant to this exception will not be given where the requesting official has in excess of 48 hours to obtain written advance approval from the Attorney General.

that at the February 6 meeting appellee offered the agent $2,000 if he would resolve appellee's tax difficulties satisfactorily.

On February 7, 1975, the IRS sought approval from the Justice Department for further electronic surveillance of face-to-face encounters with appellee. IRS procedures required that such approval be obtained from the Attorney General or any designated assistant attorney general. Despite this requirement, approval was given by a *deputy* assistant attorney general.

After receiving Justice Department and IRS authorization, the IRS monitored a meeting between the agent and appellee on February 11, 1975 during which appellee offered the agent an additional $500. This activity formed the basis for Count III.

Two issues are presented: (1) Did the district court correctly conclude that approval for each of the three electronic monitorings was obtained in violation of IRS procedure? (2) Even if some or all of the monitorings were in violation of IRS procedure, did the district court correctly conclude it was necessary to suppress the evidence obtained?

I.

IRS PROCEDURAL REQUIREMENTS

A. *The February 11, 1975 Monitoring*

For the monitoring of February 11, 1975, the IRS agents obtained proper approval from their own organization, and also obtained approval from a deputy

assistant attorney general in the Justice Department. At that time the manual read in pertinent part:

> The monitoring of non-telephone conversations with the consent of one party requires the advance authorization of the Attorney General or any designated Assistant Attorney General. Requests for such authority may be signed by the Director, Internal Security Division, or, in his/her absence, the Acting Director. *This authority cannot be redelegated.* These same officials may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance. . . .

Manual ¶ 652.22(1). (Emphasis added.)

The district court read the emphasized portion as requiring advance authorization from either the Attorney General or a designated assistant attorney general, without redelegation. The government contends that the district court's interpretation is erroneous, and we agree.

The emphasized sentence prohibiting redelegation relates only to the immediately preceding sentence outlining the procedure for requesting authorization within the IRS. The sentence following that which is emphasized, explaining that "[t]hese same officials may authorize temporary emergency monitoring" without authorization from the Attorney General, clearly refers to IRS officials, not Justice Department officials. Similarly, the words "[t]his author-

ity" in the emphasized sentence must refer only to IRS officials.

This interpretation is supported by analysis of the statutory framework relating to administrative self-regulation of electronic monitoring, and by a review of the pertinent regulatory history. Under 18 U.S.C. 2511(2)(c), electronic monitoring with the consent of one party is not illegal. *United States* v. *Ransom*, 515 F.2d 885, 890 (5th Cir. 1975). There is no need in this case, therefore, to identify the limits of Congressional delegation of the power to specially authorize that which is generally illegal. *See, e.g., United States* v. *Giordano*, 416 U.S. 505, 523 (1974). Rather, we are asked to interpret regulations which have provided procedures for obtaining administrative authority to perform activities which, under the statute, would not be illegal even absent such authorization.

On October 16, 1972, the Attorney General distributed a "Memorandum to the Heads of Executive Departments and Agencies," prescribing principles of agency self-regulation of consensual monitoring of conversations during criminal investigations. It required all federal departments and agencies to obtain advance authorization from "the Attorney General or any designated Assistant Attorney General" before conducting consensual monitoring. The IRS regulations here at issue were drafted to conform to the October 16, 1972 Memorandum. Manual ¶ 652.1(1).

By 1974 the Attorney General had amended these procedures so that advance authorization for consensual monitoring could be obtained from any *deputy* assistant attorney general, as well as designated *assistant* attorneys general and the Attorney General. A.G. Order No. 566-74 (April 25, 1974). The IRS neglected to amend its own regulations to conform to the new Justice Department rules.

It is clear that the Attorney General had the power to promulgate the regulations involved here. *See* 5 U.S.C. § 301. Within this legitimate regulatory framework he was free to delegate such departmental functions as he saw fit. *See* 28 U.S.C. § 510. Since this ability to delegate was exclusive to the Attorney General [28 U.S.C. § 509], the IRS by its own regulation could not affect the Justice Department's delegation scheme.

As amended in 1974, the Justice Department advance authorization scheme was designed to accommodate requests for consensual monitoring made by all executive departments and agencies. It defies logic to suggest that the IRS, by failing to conform its own regulation to the 1974 Justice Department amendment, implicitly required of the Justice Department a different authorization procedure for IRS requests than was established for requests from other departments.

The language of the Manual (¶ 652.22(1)) does not say expressly that authorization by a deputy assistant attorney general would be insufficient or invalid. To infer such conclusion from the wording

would be unreasonable. We hold, then, that the IRS did not fail to comply with its own regulation when it obtained authorization for the February 11, 1975 monitoring from the deputy.

B. *The January 31, 1975 and February 6, 1975 Monitorings*

The IRS failed to obtain authorization from any source in the Justice Department for the January 31 and February 6 monitorings. It argues that the meetings to be monitored on both occasions were scheduled to take place within 48 hours of the request for authorization and, under such "emergency" conditions, the IRS was not required to obtain Justice Department approval. Manual ¶ 652.22(6).[2]

We are not persuaded. It is true that in each instance less than 48 hours remained between initiation of the request for monitoring and the scheduled meeting time. But these "exigencies" were entirely government-created. *Cf. United States* v. *Curran*, 498 F.2d 30, 34 (9th Cir. 1974). There is no reason to believe that the requests could not have been made earlier. The investigation had been going on for some ten months, and the appellee was readily available for questioning during that time.

We need not here decide what constitutes an "emergency situation" warranting departure from the IRS's self-imposed requirement of obtaining advance authorization from the Justice Department. We

[2] *See* note 1 *supra*.

conclude only that the agency must present something more than government-created scheduling problems to justify its failure to follow normal authorization procedures.

II.

SUPPRESSION OF EVIDENCE

A. *Sourapas-Leahey-Heffner*

The district court relied on three cases to support its suppression order. *United States* v. *Sourapas*, 515 F.2d 295 (9th Cir. 1975); *United States* v. *Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969). In each the court of appeals ordered suppression of evidence obtained as a result of an IRS investigation of putative criminal defendants conducted without the provision of *Miranda*-type warnings as required by IRS regulations.

The government attempts to escape our holding in *Sourapas* by distinguishing it as a case dealing with principles emanating from the Fifth Amendment, whereas this case concerns Fourth Amendment problems. But the *Sourapas* court framed its issue in broad terms: "[W]hether [the IRS agent] failed to substantially comply with the publicized IRS procedures and if so, whether the evidence suppressed was wrongfully obtained. . . ." 515 F.2d at 298.[3]

[3] Similarly, the *Leahey* court framed the "crucial question" as being

"whether we must exclude this evidence so that agencies

By holding in *Sourapas* that evidence obtained by IRS activity which did not substantially comply with its own regulations must be suppressed, we placed no special emphasis upon the specific constitutional principles which underlay the regulatory scheme at issue. We regard *Sourapas* as controlling here.

During "a period of increasing disenchantment with the exclusionary rule," *United States* v. *Leonard*, 524 F.2d 1076, 1089 (2nd Cir. 1975),[4] the suppression of evidence because of noncompliance with an administrative regulation only, without any showing of statutory or constitutional violation, may be a questionable approach.[5] Nevertheless, *Sourapas* remains the law of this circuit. Absent a contrary ruling by the Supreme Court or by this court en banc, we are bound to follow it.

Our decision today does not mean that in every instance a deviation from general guidelines govern-

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will be compelled to adhere to the standards of behavior that they have formally and purposely adopted in the light of the requirements of the Constitution, even though these standards may go somewhat further than the Constitution requires."

434 F.2d at 10.

[4] *See, e.g., United States* v. *Janis*, —— U.S. ——, 44 USLW 5303 (July 6, 1976); *Stone* v. *Powell*, —— U.S. ——, 44 US LW 5313 (July 6, 1976); *Leonard, supra*, 524 F.2d at 1089 and Supreme Court cases cited; *United States* v. *Walden*, 490 F.2d 372 (4th Cir. 1974).

[5] *But see* the analysis of Chief Judge Coffin in *Leahey, supra*, 434 F.2d at 10-11, in support of application of the exclusionary rule in the event of noncompliance with administrative procedure.

ing Executive exercises of discretion will result in automatic exclusion of evidence. As noted in *United States* v. *Leahey*, 434 F.2d 7, 11 (1st Cir. 1970): "We do not say that agencies always violate due process when they fail to adhere to their procedures." Here, however, the noncompliance by the IRS for the January 31 and February 6 monitorings harmed more than just the "efficiency of the I.R.S. operations." *Id.*

B. *Poisonous Fruit*

Appellee asserts that the IRS agent's application for authorization for the February 11, 1975 monitoring contained information illegally obtained during the monitorings on January 31 and February 6. He argues that all evidence obtained from the February 11 meeting must therefore be suppressed as "fruit of the poisonous tree."

Yet it is clear that the information in the application for authorization was based upon the agent's independent recollection of the meetings of January 31 and February 6, not upon the recordings themselves. Since the agent's presence at the meeting with appellee was scarcely illegal, the agent's own recollection constituted a valid source independent of the "poisonous" tapes.

It was the conversations themselves, not the illegal monitoring thereof, which led to the application for the February 11 monitoring. Since the illegal monitoring itself did not "tend significantly to direct the investigation toward the specific evidence sought to

be suppressed . . .," *United States* v. *Cales*, 493 F.2d 1215, 1216 (9th Cir. 1974), suppression of evidence obtained on February 11, 1975 was not warranted.

III.

CONCLUSION

The district court's order suppressing evidence obtained from the illegal monitoring of January 31 and February 6, 1975 is affirmed. The order suppressing evidence obtained from the monitoring of February 11, 1975 is reversed. Remanded for proceedings consistent herewith.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 76-1091

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ALFREDO L. CACERES, DEFENDANT-APPELLEE

Before: WRIGHT and SNEED, Circuit Judges, and FITZGERALD, District Judge.

[January 20, 1977]

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Sneed have voted to reject the en banc suggestion.

The full court has been advised of the suggestion for a rehearing en banc, and no judge of the court has requested a vote on the en banc suggestion. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The panel has voted to amend the slip opinion filed October 15, 1976. The following additional paragraph will be inserted on page 7 of the slip opinion, following the second full paragraph:

> Our decision today does not mean that in every instance a deviation from general guidelines governing Executive exercises of discretion will result in the automatic exclusion of evidence. As noted in *United States* v. *Leahey*, 434 F.2d 7, 11 (1st Cir. 1970): "We do not say that agencies always violate due process when they fail to adhere to their procedures." Here, however, the noncompliance by the IRS for the January 31 and February 6 monitorings harmed more than just the "efficiency of the I.R.S. operations." *Id.*

The opinion filed October 15, 1976 is ordered withdrawn and reprinted to incorporate the above language. The clerk is also directed to correct the designation of Caceres as the appellant. He should be referred to as the appellee and the government as the appellant.

DATED:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 75-129 GBH

[Original Filed Dec. 10, 1975, William L. Whittaker, Clerk, U. S. Dist. Court, San Francisco]

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALFREDO L. CACERES, DEFENDANT

OPINION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS

Defendant Caceres has been indicted for bribery of a public official. He comes before the court seeking to suppress evidence obtained by means of alleged illegal electronic monitoring and surveillance.

The investigation by the Internal Revenue Service relevant to this proceeding began when Agent Yee reported an alleged bribe offer made to him by defendant. The Internal Security Division of the I.R.S., under the general case supervision of Inspector Hill, began its investigation in March of 1974. On March 21, 1974, Agent Yee's telephone call to defendant was electronically monitored.

Agent Yee had a follow-up telephone conversation with defendant that month (not monitored), but thereafter, although the investigation continued, Agent Yee's contacts were confined to defendant's wife and defendant's accountant until January of 1975.

Agent Yee resumed his contact with defendant by initiating telephone calls on January 28, 1975, and subsequent telephone calls on January 29, January 30, February 5 and February 13, 1975. All of these telephone conversations were electronically monitored.

Agent Yee also had in-person meetings with defendant on January 21, February 6 and February 11, 1975. These, too, were electronically recorded by means of a device planted on Agent Yee's person.

Defendant attacks the evidence gathered from such electronic monitoring on a variety of grounds. For purposes of the instant motion, the telephone and in-person contacts will be considered separately.

I. *Electronic Surveillance of Telephone Conversations*

The I.R.S. has promulgated a comprehensive set of regulations governing both telephone and in-person conversation monitoring.

Internal Revenue Manual Para. 652.21, which governs telephone monitoring under the circumstances at issue here, permits such monitoring only if consensual [see also Para. 652.3] and only after approval is sought and received from the Assistant Regional Inspector (Internal Security) or the Chief of the National Office Investigations Branch (Internal

Security), or in the absence of any of them, the person acting in his or her place. The regulation also requires that, as soon as practicable after the interception, the case inspector file a report with the approving higher official containing certain designated information.

Each of the recorded telephone conversations was conducted pursuant to oral authority granted by the Assistant Regional Inspector and appears to be at least in substantial compliance with the governing I.R.S. regulations and therefore proper.

Defendant's remaining basis for attack is that such monitoring was in violation of state law, to-wit, California Penal Code § 632. Although defendant contends that the I.R.S. regulations intend to prohibit electronic monitoring whether unlawful under federal *or* state law, a fair reading of the regulations will not support this interpretation, and the Ninth Circuit has explicitly rejected this line of reasoning. *United States* v. *Keen*, 508 F.2d 986, 989 (9th Cir. 1974), *cert. den.*, —— U.S. —— (1975). *See also United States* v. *Shaffer*, 520 F.2d 1369, 1371-1372 (3rd Cir. 1975).

Accordingly, defendant's motion to suppress as to evidence obtained from the monitored telephone conversations is hereby DENIED.

II. *Electronic Surveillance of In-Person Conversations*

Recognizing the increased sensitivity and need for protection with respect to in-person conversations, the Internal Revenue Manual prescribes a more stringent

procedure when authority is sought to monitor these. Para. 652.22 governs consensual monitoring of non-telephone conversations and requires the advance approval of all of the following: the Regional Inspector (or Chief, Investigations Branch); the Director, Internal Security Division; and the Attorney General or any designated Assistant Attorney General. By regulation, the authority of the Attorney General or any designated Assistant Attorney General cannot be redelegated.

The Government contends that the I.R.S. was in literal, or at least substantial, compliance with these regulations when it carried out the in-person monitoring of defendant, but this contention is not supported by the record or the applicable law. At no time was there granted authorization from the Attorney General or any designated Assistant Attorney General for the monitoring in question here. The in-person conversation of February 11, 1975, was authorized by a *Deputy* Assistant Attorney General, but this is not a person authorized by the regulation to give such approval, and the regulation clearly provides that there may be no redelegation of such authority.

The Government concedes that at least as to the in-person conversations of January 31 and February 6, 1975, there was no prior authorization by the Attorney General or any designated Assistant Attorney General. The Government argues, however, that such authorization was unnecessary as to *any* of the in-person conversations because the I.R.S. was proceed-

ing under the less stringent "emergency" provisions of Para. 652.22.

Subsection (1) thereof provides that prior approval of the Attorney General (or any designated Assistant Attorney General) need not be sought in certain situations. The Director, Internal Security Division "may authorize temporary emergency monitoring when exigent circumstances preclude requesting the authorization of the Attorney General in advance." Although no definition of "exigent circumstances" is provided by the regulations, both parties herein have proceeded on the basis that an emergency situation does not exist under the regulation when the requested official has more than 48 hours to obtain written advance approval from the Attorney General or a designated Assistant Attorney General. See Para. 653.22 (6).

It is clear that there was here no "emergency" within the intendment of the regulation. Each of the in-person conversations occurred as the result of action initiated by Agent Yee after Yee and Inspector Hill had devised a general method for dealing with defendant. In each instance Agent Yee picked the day on which the meeting between defendant and him was to be conducted. No emergency apart from this existed. Agent Yee first testified that he was concerned about the running of the applicable statute of limitations against defendant on his tax investigation, but subsequent testimony confirmed that (a) such statute would not lapse on the normal date of January 31, 1975, but was in fact extended to late

February or early March because of defendant's previous late filing, a fact known to Agent Yee, and (b) that Agent Yee offered no satisfactory explanation why defendant was not contacted in the 10-month hiatus following the monitored telephone call of March 1974. In short, the only "emergency" was created wholly by the I.R.S.

Inspector Hill testified that he had sought written authorization in late January from the Attorney General for surveillance over a thirty-day period, but that since it had not yet been received there existed an "emergency" which allowed the monitoring of the January 31 and February 6 conversations without such approval. This argument is without logic or merit, and does not excuse the non-compliance with explicit I.R.S. regulations.

The Government argues that even if the I.R.S. regulations were not followed, that nonetheless such failure should not be the basis for suppressing evidence in this criminal proceeding.

This court believes, however, that the instant case is controlled by Ninth Circuit law as expresed in *United States* v. *Sourapis* [sic], 515 F.2d 295, 298 (9th Cir. 1975). The court reads this case as approving the holdings of *United States* v. *Heffner*, 420 F. 2d 809, 811 (4th Cir. 1969) and *United States* v. *Leahey*, 434 F. 2d 7, 10 (1st Cir. 1970) in situations such as that presented here. Those cases cannot be distinguished, contrary to the Government's contention, by the fact of greater publicity accorded to the I.R.S. pronouncements at issue therein, for

the I.R.S. regulations challenged here were likewise available for public inspection, and the same reasons which underlie decisions such as *Sourapis* [sic] apply equally here.

Accordingly, as to the in-person conversations of January 31, February 6 and February 11, 1975, defendant's motion to suppress is hereby GRANTED.

It is so ordered.

Dated: Dec. 16, 1975

/s/ Geo. B. Harris,
United States District Judge

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